Supreme Court of the United States

THOMAS D. MCCARTHY, United States Marshal for the Southern District of New York,
Appellant,

against

JULES W. ARNDSTEIN,
Respondent.

BRIEF FOR APPELLANT.

Statement of the Case.

The United States Marshal for the Southern District of New York appeals from an order sustaining a writ of *habeas corpus* and discharging the petitioner. By the writ, petitioner attacked the validity of an order adjudging him in contempt of court for refusal to answer certain questions upon his examination in bankruptcy—questions which the Court had ordered him to answer.

Outline of Facts; Arndstein's Examination in Bankruptcy and Commitment for Contempt.

On February 19, 1920, an involuntary petition in bankruptcy was filed against Jules W. Arndstein, under the name of Nicholas Arnstein (pages

6 and 7)*. Arndstein had left New York City about February 10, 1920 (page 32). His whereabouts remained unknown until May 15th, when he returned to New York (page 33) and presented himself for examination before the Commissioner in Bankruptcy (page 29). The Commissioner, at the beginning of his examination, warned him that he need not answer any question that would "either tend to incriminate or degrade you" (page 30). On the examination held on this day, he answered freely many questions, including all those asked him concerning his own and his wife's relatives (pages 33-5, 37-42), his bank accounts (pages 36, 39-40, 42) and his safe deposit boxes (pages 36, 39-40, 42); and he testified that "since Washington's Birthday this year" he had had no property in his possession (page 49), except $500 which he got from his wife (page 49). He stated that between February 12th and May 15th he had been "on the road" (page 32), "traveling through the United States" (page 50). As to his possession of stocks and bonds, he testified emphatically:

> "I never had any in my life. I never owned a share of stock in my life. I never even saw a genuine certificate in my life. I never possessed one in my life, any negotiable stock" (page 37).

In answering questions along these lines, however, he encountered strenuous objection and interference on the part of his own counsel whose un-

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*We refer in this brief to the pages of the printed record, as numbered at the top.

willingness to permit him to give answers on any of these subjects was plainly evident. The record shows counsel's apparent attempts to tell the witness how to answer (pages 31, 32, 37); counsel's request "Now, I ask your Honor to instruct the witness that he may claim his privilege to that question" (page 50); and counsel's open protest that the witness's answers to "all these questions" (about bank accounts, safe deposit boxes and stocks and bonds, pages 35-7) were being given against counsel's advice (page 37).

Gradually the witness fell into the way of accepting his counsel's judgment, claiming that the answers to later questions concerning property and assets would incriminate him (page 47), and that the answers to all questions as to his whereabouts before he reappeared at Columbus Circle in New York City at 9 o'clock on the morning of May 15th, would either degrade (page 51), or incriminate him (pages 61-63).

On the second day of the hearing the bankrupt testified further in regard to his property [after objecting at the outset, "I cannot answer that, for the same reason"—page 89], first, that he *could not remember* (pages 89-90) how long before the filing of the petition in bankruptcy he had "any property of any nature, kind or description" in his possession or under his control, and later that "for a period of at least seven months immediately preceding the filing of the petition in bankruptcy in this proceeding" he did not have "any property of any nature, kind or description" (pages 91-92). To the question whether he had had "any property of any nature, kind or description *since* the filing of the petition in bankruptcy in this proceeding"

(page 92), he testified—again after refusing at first "on the ground that it might incriminate me"—"Yes, I have had a little money from time to time" (page 92). After he had answered "No, sir" to the question "Have you any automobiles now, either in your possession or under your control?", his testimony along this line was cut short by his counsel's peremptory instruction, *"Now, don't answer that"* (page 94). So also the inquiry as to his acquaintance with Nick Cohen (page 75): after the question "Do you know Nick Cohen?" he was asked "Will you answer that?" and replied "Yes, sir." His counsel interposed with the instruction *"No, you refuse to answer."* Thereafter he did refuse to answer all questions as to acquaintances and most questions as to assets on the ground that the answers would tend to incriminate him (see pages 94-113).

On the third day he was asked:

> "Aside from the $500 you speak of, have you had any money or property in your possession, or held by you, since the filing of the bankruptcy petition,"

his answer was:

> "I answered that at the last hearing, sir."

His counsel, however, stated:

> "We refuse to answer,"

and again

> "He refuses to answer."

The bankrupt thereupon acquiesced in this direction of counsel and answered the further question:

"On what ground?"

with a claim of privilege—

"The same ground, sir; tend to incriminate me" (page 131).

Upon an order to show cause dated June 1, 1920 (pages 740-1), the list of questions to which the attorney for the trustee in bankruptcy had failed to secure answers upon these hearings, and all other disputed questions (pages 751-769) were submitted to Judge Augustus Hand, to determine whether the bankrupt had already committed contempt of court by his refusals to answer, and further to determine whether he should be held to answer all these questions.*

Judge Hand denied the motion to punish for contempt (Opinion of June 28, 1920; pages 771-2). He decided however (Opinion of August 10, 1920, pages 772-3) that the bankrupt should be directed to answer the questions—with a few carefully stated exceptions (page 773)—on the ground that, on June 10th, after the order to show cause had been obtained, the bankrupt had filed schedules of his property without claiming privilege, and had thereby become subject to examination in regard

*Schedule A (page 751) contains questions which the Commissioner directed the bankrupt to answer and which he refused to answer; Schedule B (752) a question which the Commissioner asked the bankrupt and which he refused to answer; Schedule C (752), questions put by counsel for the trustee which the bankrupt refused to answer; Schedules D (756) and E (766), questions put by counsel for the trustee objection to which was sustained by the Commissioner.

to the statements contained in the schedules. Accordingly Judge Hand signed an order directing the bankrupt to answer these questions (Order of September 1, 1920; pages 774-5).

Thereafter, on September 24th (page 150) the examination was resumed. On this occasion, counsel for the bankrupt at first offered to stipulate that

> "the questions called for in the order were asked, and that the bankrupt refused to answer, asserting his Constitutional privilege and that he was ordered and directed to answer them, and that he refused to answer them" (page 150).

This offer was rejected and the questions in Schedule C were put to the bankrupt. He refused to answer each one (pages 150-155).

At the close of this list of questions in Schedule C, the Commissioner, referring to all the schedules inquired:

> "I presume you will refuse to answer every question that is asked, and that you decline to answer on the ground that it will tend to incriminate or degrade you?"

The bankrupt replied:

> "Yes, sir" (page 155).

Upon the same day, Judge Manton signed an order declaring the bankrupt in contempt (page 776).

Application for Writ of Habeas Corpus Denied by District Court; Opinions of this Court on Reversal and upon Application for Re-argument.

On September 20th, the District Court denied a writ of *habeas corpus* on the ground, among others, that the bankrupt by filing schedules had waived his right to refuse to answer about his property (pages 782-783, Opinion, pages 780-782). Upon appeal to this Court, this order was reversed on the ground that the "mere filing" of the schedules did not constitute a waiver of the constitutional privilege. "Standing alone they did not amount to an admission of guilt or furnish clear proof of crime." (Opinion, *Arndstein* vs. *McCarthy*, page 787, reported 254 U. S., 71.) It was accordingly directed that the writ issue.

On December 20, 1920, this Court denied a motion by the trustee in bankruptcy for permission to intervene and for reargument of the appeal (page 789, reported 254 U. S., 379). The opinion denying that motion characterized the holding that the writ should issue as in effect a holding upon demurrer, and pointed out that it merely required "the trial court to accept our decision upon the point of law, to issue the writ and then to proceed as usual." *"If proper reasons exist for holding the prisoner not shown by the petition neither our opinion nor mandate prevents them from being set up in the return and duly considered"* (page 789).

Order Sustaining Writ and Discharging Petitioner.

Thereafter, on October 31, 1921, upon a return (page 1) which set forth all the testimony and proceedings in bankruptcy (page 4), Judge Augustus Hand made the order sustaining the writ and discharging the petitioner (page 793). From that order this appeal is taken (page 797). Judge Hand, in his opinion (pages 791-3) explained that he made the order in deference to the ruling of this court, declaring himself unable to distinguish the question of waiver presented by the filing of the schedules from that presented by the bankrupt's testimony, and expressly leaving it to this court to differentiate the right to the issuance of the writ from the right to release upon the hearing under the writ (page 793).

Principal Questions Presented.

Appellant rests his appeal upon the following contentions:

(1) Attack upon the contempt order by *habeas corpus* must fail if the petitioner's refusals to answer were unjustified as to even one question. Partial error in the contempt order will not avail the petitioner.

(2) The decision of this Court in *Arndstein* vs. *McCarthy* (254 U. S., 71) was mistakenly applied by the District Judge. That decision did not disturb the well-established rule of law that a witness who gives oral testimony upon a specific topic

—whether that testimony consists of denials or partial disclosures—waives his constitutional privilege to refuse to answer further questions on the same topic.

(3) By denials and partial disclosures voluntarily made by Arndstein concerning his property, his names and his travels, he waived his privilege to refuse to answer questions subsequently asked him on these same topics.

(4) Arndstein's claim that his answers would incriminate him was in certain instances manifestly without merit. Sometimes this appears from the character of the questions; sometimes from his other testimony.

(5) The record shows Arndstein's whole claim of constitutional privilege was vitiated by bad faith, and did not rest upon a sincere belief that he could not safely answer any of the 450 questions which he was held in contempt for refusing to answer.

Specification of Errors.

All these questions are presented by the assignments of error, especially the assignments numbered 2 to 10 inclusive, upon which the Marshal rests his appeal. Without setting them forth at length we beg leave to refer the court to these assignments, which appear in the record at pages 795-796.

POINT I.

Arndstein did not appeal from the order adjudging him in contempt, but attacked it collaterally by writ of habeas corpus. An improper refusal to answer a single question—improper because the claim that the answer would incriminate was obviously made in bad faith, or because no possible answer to the question could have had that effect or because the privilege against self-incrimination had been waived as to that particular topic—is sufficient to support the contempt order against attack by habeas corpus. The petitioner had the burden of showing that his refusals to answer were justified in every instance.

The present application is not an appeal from the order directing Arndstein to answer questions or from the order adjudging Arndstein in contempt. Arndstein took no such appeal. He attacked the contempt order by *habeas corpus*. The issue accordingly is not whether the order adjudging him in contempt was in all respects correct, but whether it had any validity. One who seeks relief from an order or judgment by writ of *habeas corpus*, cannot succeed unless the order or judgment is void. Partial error affords no ground for relief.

> "Under a writ of *habeas corpus* the inquiry is addressed not to errors, but to the question

whether the proceeding and the judgment rendered therein are, for any reason, nullities, and unless it is affirmatively shown that the judgment or sentence, under which the petitioner is confined, is void, he is not entitled to his discharge" (*United States* vs. *Pridgeon*, 153 U. S., 48, 62-63).

Hale vs. *Henkel*, 201 U. S., 43;
In re Swan, 150 U. S., 637;
Ex parte Davis, 112 Fed., 139;
In re Rogers, 129 Cal., 468.

The principle was applied to the instant subject in *Hale* vs. *Henkel* (*supra*). An order dismissing a writ of *habeas corpus* was affirmed by this court on the ground that the contempt order under review was justified by the witness's refusal to answer questions before the grand jury, although his disobedience of a subpoena requiring him to produce books and documents, included in the same contempt order, was held justifiable resistance to "an unreasonable search and seizure." "*But this objection,*" said Mr. Justice Brown, in concluding his opinion, "*does not go to the validity of the order remanding the petitioner,* which is, therefore, affirmed" (201 U. S. at page 77).

In *In re Rogers* (*supra*) the witness's privilege against self-incrimination was invoked by him in support of eleven refusals to answer. (The number in the instant case is about 450.) The Supreme Court of California, finding one of these refusals unjustified, declared it unnecessary even to consider the rest and said:

> "It appears, therefore, that as to at least one interrogatory (*and this inquiry need go no further*) the witness' refusal to answer was not justified in law, and that, therefore, he was properly adjudged to be in contempt (129 Cal. at page 471; italics ours).

The contempt order must then stand against this attack by writ of *habeas corpus* unless all the questions which Arndstein refused to answer were improper questions. And the burden of showing their impropriety is upon Arndstein (*McGorray* vs. *Sutter,* 80 Ohio State, 400). It is for the "petitioner" to show "affirmatively" that he is held not under a partially erroneous, but under a *"void"* order (*U. S.* vs. *Pridgeon, supra*).

In the instant case (although the burden is not upon us), we are prepared to show that many of the refusals were under the settled principles of the subject improper.

Many questions which Arndstein refused to answer were in their very nature harmless or were shown to be harmless by answers given to related questions; his evident bad faith colored and vitiated his whole claim of privilege; and, even had it been asserted in good faith, Arndstein as matter of law waived his privilege in respect to many topics by the voluntary giving of testimony favorable to himself.

POINT II.

The issue of waiver on the present record which includes the oral testimony of Arndstein, is wholly different from the issue in Arndstein vs. McCarthy (254 U. S., 71), a case decided upon the schedules "standing alone." The settled principles of the subject are that a witness who does testify concerning matters that might incriminate him, waives his privilege to refuse further answers; and this is true alike where the testimony takes the form of "denials" and where it takes the form of "partial disclosures."

The only question which Judge Hand considered in making the order from which this appeal is taken, was the question of waiver. On that issue he believed the decision of this Court in *Arndstein* vs. *McCarthy* (254 U. S., 71, 379, see page 7 *supra*) to be a binding precedent, an insuperable barrier to the holding he evidently wished to make (page 793). (The reluctance with which Judge Hand sustained the writ is evident from the opinion [pages 791-3].) He noted that a different record was before him—that the whole of the bankrupt's examination was annexed to the return, whereas "only the questions and schedules in bankruptcy accompanied the petition" (page 792). But he found himself unable to see any difference in legal effect between the bankrupt's "denials and partial disclosures" in the course of his examina-

tion under oath, and those contained in the schedules (pages 24-7). In this situation, he had no choice but to discharge the prisoner, at the same time in terms recommending an appeal to this Court (page 793).

Highly important upon this appeal is the explicit recognition by the District Judge that Arndstein did make these partial disclosures and denials. His view of Arndstein's testimony—the only view (we shall see in Point III) that could be taken of that testimony—is a view in full accord with the construction of that testimony we urged below and shall later develop here. It was because of the District Court's view of the law—his conception of the *legal* effect of partial disclosures and denials in the light of the *Arndstein* decision—that his holding was in favor of the prisoner. We shall show that in his view of the law the learned District Judge erred. We shall see (1) that this Court's opinion in the *Arndstein* case was limited so as not to be an authority upon the instant question and (2) that the general principles of law forbid its application to the instant question.

(1) The decision of this Court in Arndstein vs. McCarthy (254 U. S., 71), was limited to the issue presented by the schedules "standing alone," and the question whether the petitioner should be discharged from custody was left open, to be determined upon the record annexed to the return.

The opinion in *Arndstein* vs. *McCarthy* (254 U. S., 71), was reconsidered by this Court upon a motion for a rehearing (254 U. S., 379; record, page 789); and at that time Mr. Justice McReynolds, who had written the earlier opinion, carefully—and

in precise accord with his former expression—restated the effect of that decision. He made it clear that in reversing the order denying the writ, this Court had decided nothing more than that *"the bankrupt did not waive his constitutional privilege merely by filing sworn schedules"*; and pointed out that the question whether the petitioner should be discharged remained still to be determined, and that it was open to respondent to set up in his return the facts upon which the contempt order issued.

The essential paragraph of the opinion on the rehearing is as follows:

> "The court below heard the cause as upon demurrer* and held the petition for *habeas corpus* insufficient. Disagreeing with the result we concluded that the bankrupt did not waive his constitutional privilege merely by filing sworn schedules, that the petition was adequate, and that the writ should have issued. The mandate only requires the trial court to accept our decision upon the point of law, to issue the writ and then to proceed as usual. If the petition does not correctly set forth the facts, or if proper reasons exist for holding the prisoner not shown by the petition neither our opinion nor mandate prevents them from being set up in the return and duly considered" (page 789).

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*The Court had to treat the application for the writ as "upon demurrer" under the statutory rule (Comp. Stat., Sec. 1283) that "the court, or justice or judge to whom such application is made shall forthwith award a writ of *habeas corpus*, unless it appears from the petition itself that the party is not entitled thereto."

The only inference that can be drawn from this terse commentary by the author of the original opinion is that the question of waiver presented by the bankrupt's oral examination was not intended to be, and has not been, in any sense prejudged. The decision upon the schedules is, therefore, no precedent upon the issue of waiver presented by the testimony upon the examination. The two questions are different, and so we shall see, are the rules which apply to them.

(2) The question of waiver presented by the filing of the sworn schedules is altogether different from that presented by the bankrupt's oral testimony upon his examination. The point decided by this court on the earlier appeal—that the bankrupt did not waive his constitutional privilege merely by filing sworn schedules—offered no basis for concluding that he did not waive it by his "denials and partial disclosures," voluntarily given in the course of his examination on oath.

The District Judge's misconception of the effect of the *Arndstein* decision was the result of a practice into which the Federal Court in the Southern District of New York had fallen some years before. That court had treated the filing of schedules as a conclusive waiver of the bankrupt's constitutional privilege, and would not permit a bankrupt who had filed schedules to refuse upon his examination to answer questions about his property (*In re Tobias*, 215 Fed., 815; see the opinion of Judge A. N. Hand of August 10, page 772, and note the reference to "the rule in this district"). This practice was doubly erroneous.

(a) The prime misconception was as to the nature of schedules. This Court has expressly held that *schedules are not testimony,* and are not to be treated as such in cases involving constitutional privilege. (*Ensign* vs. *Pennsylvania,* 227 U. S., 592, and see *Schonfeld* vs. *U. S.,* 277 Fed., 934; certiorari denied 258 U. S., 623.)

Ensign vs. *Pennsylvania* decides that the immunity provision contained in Section 7 (9) of the Bankruptcy Act—"no *testimony* given by him shall be offered in evidence against him in any criminal proceeding"—is not violated by receiving in evidence upon a criminal prosecution in a State Court the schedules which defendant had filed in involuntary bankruptcy. *Schonfeld* vs. *United States* rules that schedules filed by an involuntary bankrupt are properly admitted in evidence upon his trial in a Federal Court for the offence of fraudulently concealing his property.

It was the habit induced by the erroneous practice of treating schedules and testimony as if they were one and the same thing that led Judge Hand to believe that he was confronted by a binding precedent in *Arndstein* vs. *McCarthy.*

(b) The schedules and the bankrupt's examination are not only different in character; they are distinct steps in the bankruptcy proceeding. Questions of waiver arising in the course of the examination must be decided solely on the testimony given by the bankrupt during the examination, without reference to anything that he may have said or done outside that part of the proceeding. This conclusion is in accord with the general rule that a witness who testifies at a preliminary hear-

ing or upon the first trial of an action, may still assert his privilege when called upon later to testify at a subsequent trial.

Emery vs. *State,* 101 Wis., 627;
Temple vs. *Commonwealth,* 75 Va., 892;
Overend vs. *Superior Court,* 131 Cal., 280;
Georgia R. & Bkg. Co. vs. *Lybrend,* 99 Ga., 421;
People vs. *Cassidy,* 213 N. Y., 388, pages 395-6;
State vs. *Lloyd,* 152 Wis., 24;
Abbott, Civil Jury Trials (4th Ed.), page 206;
Wigmore on *Evidence,* Vol. IV, Sec. 2276, pages 3158-9.

Judge Hand in reality fell into the same error in his decision upon the instant application as in his previous holding that the filing of schedules waived the bankrupt's privilege upon the examination (pages 772-773). Upon both occasions he overlooked the fact that schedules and examination are different things and distinct stages in the proceeding. Because he conceived of them as in effect the same thing, he erroneously—as this Court in *Arndstein* vs. *McCarthy* decided—held that statements in the schedules could waive a privilege upon the examination. Still because he thought of them as the same thing, he erroneously, in the instant case, concluded that since answers in the schedules did not constitute a waiver upon the examination, so answers upon the examination could not do so.

(3) The distinction which the District Court drew between a bankrupt testifying in his own behalf and a bankrupt called as a witness by the trustee is without foundation. There are no sides in a bankruptcy examination.

The District Court's initial mistake in assuming that the "denials and partial disclosures" in the course of the examination could have no different effect on the question of waiver from the denials and partial disclosures contained in the filed schedules, involved him in still further error:

> "Apparently the Supreme Court has treated an examination of the bankrupt where he has been called as witness by the other side in a different way from an examination where he has taken the stand and testified in his own behalf. In the latter case under all the decisions the broadest cross examination is proper. The ruling in the Arndstein case would seem to indicate that where the bankrupt does not testify in his own behalf he is at liberty to cease disclosures about his property, even though some have been made, whenever there is any just ground to believe the answers may tend to incriminate him" (pages 792-3).

In the above the error (in addition to the general error of supposing that this court had passed upon the same question as is presented by the oral testimony of the bankrupt) is three-fold:

(a) There is no analogy between an examination in bankruptcy and an ordinary trial with opposed parties and issues defined by the pleadings. The

distinction between a witness testifying for his own side or for the other is in its relation to a bankruptcy examination an all but meaningless distinction. There are no sides in a bankruptcy examination. There is a mere inquiry to determine the facts concerning the bankrupt's property and its disposal. The true analogy would be to an examination before a committee of Congress or a trade commission or other mere fact-finding body. Of the nature of a bankruptcy examination Mr. Remington writes:

> "No issue is involved. No fact is asserted on one side and denied on the other. No fact is to be proved or disproved. The examination is simply a general inquiry into the 'acts, conduct and property of the bankrupt,' the cause of his failure, the whereabouts of his property, the contracts relating to his business, and in short an examination into all matters and things of reasonable interest to the creditors; and, as a consequence, a great latitude of inquiry is permitted" (Vol. I [1st Ed.], page 923).

In accord are

> *In re Williams*, 123 Fed., 321, 326;
> *In re Fixen*, 96 Fed., 748.

(b) Even if we assume, however, that any analogy exists between a bankruptcy proceeding and a litigated civil action—even if we could speak of the bankrupt as being called as a witness for the trustee,—he is a hostile witness. Such a witness can, of course, be subjected to the most searching examination by the counsel that calls him.

Ferrell vs. *Prame*, 206 Fed., 278 (C. C. A., 6th Cir.);
People vs. *Sexton*, 187 N. Y., 495;
Symes vs. *Fletcher*, 115 Atl., 502 (Vt., 1921);
Dumas vs. *Clayton*, 32 App. D. C., 566;
North Am. Restaurant vs. *McElligott*, 227 Ill., 317;
Jones, Evidence, Sec. 817.

It is "manifestly proper" for counsel, as was stated in a late case (*Symes* vs. *Fletcher*, supra) to question a hostile witness called by him as if "in cross examination," probing his initial denials, and exploring and amplifying his partial disclosures.

(c) These two errors or either of them would have been alone sufficient to vitiate Judge Hand's conclusion. They did not, however, stand alone, but seem to have contributed to still another misconception—the erroneous idea that in *Arndstein* vs. *McCarthy*, this Court intended to or did treat the "examination of the bankrupt where he has been called as a witness by the other side in a different way from an examination where he has taken the stand and testified in his own behalf." We do not understand that any Court has ever proposed any such distinction—with respect to the constitutional privilege against self-incrimination—between a party to a civil action who takes the stand in his own behalf and a party to a civil action who is called as a witness for the other side, or ever attempted to distinguish—with respect to the privilege against self-incrimination—the case of a witness who is a party from the case of any other witness in a civil suit. (See *Wigmore*, Vol. IV, Sec. 2268 (3), page 3134.) Except in the peculiar case of a defendant in a criminal prosecution—peculiar

because he and he only has the option of refusing to become a witness at all—*the mere act of taking the stand is never in itself a waiver of the constitutional privilege.* Any ordinary witness, having taken the stand, may still refuse to answer about incriminating matters, and any witness by answering about them waives his privilege and must give further answers. The sole test, in the case of any ordinary witness, we shall see, is the content of the testimony he has already given.

(4) A witness who without claiming privilege gives testimony on a certain topic waives his privilege in relation thereto, and cannot refuse to answer further questions.

The privilege against self-incrimination is a privilege against being *compelled* to be a witness against one's self (Fifth Amendment). A witness who voluntarily testifies is not compelled. In a case which this Court in *Hale* vs. *Henkel* (201 U. S., at page 63) cited with approval as an authority upon the general subject, it was said (*U. S.* vs. *Kimball,* 117 Fed., 156, 163):

> "The provision means that no person shall be forced to be a witness against himself, against his free will. This does not mean that he may not be a witness against himself."

A witness may, of course, refuse to testify at all about incriminating matters. If he does testify, he cannot, however, stop in the middle. He cannot end his tale with a half-truth that in its effect may be the most insidious falsehood.

It has been repeatedly held that a witness who testifies without asserting his privilege has so far waived it that he cannot invoke it against more searching inquiries on the same subject.

Ex parte Senior, 37 Fla., 1, p. 267;
State vs. *Fay,* 43 Iowa, 651;
Foster vs. *Pierce,* 11 Cush., 437;
State vs. *Nichols,* 29 Minn., 357;
State vs. *Foster,* 23 N. H., 348;
Norfolk vs. *Gaylord,* 28 Conn., 309 (cited in *Brown* vs. *Walker,* 161 U. S., page 597;
State vs. *K.,* 4 N. H., 562 (cited in *Brown* vs. *Walker,* 161 U. S., page 597);
Chamberlain vs. *Willson,* 12 Vt., 491 (cited in *Brown* vs. *Walker,* 161 U. S., page 597).

A witness, who upon an investigation of alleged illegal voting testifies that he cast his ballot for a particular candidate, can be required to answer questions concerning his birth, naturalization and registration (*Ex parte Senior, supra*); a witness who testifies that he does not recollect ever having sold brandy for the defendant, may be required to answer the question whether he had not on a particular occasion sold brandy to a particular person (*State* vs. *Foster, supra*); a witness who testifies that he knows who the father of a bastard is (*Foster* vs. *Pierce, supra*), or that he knows the complainant had intercourse with others than defendant about the time the child was begotten (*State* vs. *Nichols, supra*), or that he knows who disinterred a body (*State* vs. *K., supra*), cannot refuse to name himself as the guilty party; the defendant in a bastardy suit, who offers himself as a witness and testifies that he has not had intercourse with the mother within the year before the child was born, must submit to cross examination concerning this statement (*Norfolk* vs. *Gaylord,*

supra). The necessity of the principle is well stated in the *Gaylord* case:

> "Under such circumstances, to have prohibited the inquiry would have enabled the witness, by his simple *'ipse dixit'* * * * to foreclose all inquiry of him in regard to it, and would thus have rendered his cross examination, justly regarded as one of the principal and most efficacious means provided by law for the ascertainment of the truth, a worthless form" (28 Conn., pages 313-4).

In *People* vs. *Cassidy* (213 N. Y., 388, 394), the New York Court of Appeals stated the rule and its reason as follows:

> "A person cannot waive his privilege under the constitutional provisions and give testimony to his advantage, or the advantage of his friends, and at the same time and in the same proceeding assert his privilege and refuse to answer questions that are to his disadvantage or the disadvantage of his friends."

The cases we have analyzed are cases of flat application involving, as does the instant case, the situation of an "ordinary witness" (*Wigmore,* Vol. IV., Section 2276, page 3151). Essentially similar principles apply to the case of a defendant in a criminal prosecution who takes the stand in his own behalf, although in that particular case (as we have said, page 21, *supra*) the waiver is deduced not from the content of testimony, but from the fact of taking the stand. The rule of this court is that the criminal defendant can, like the

"ordinary witness" (*Fitzpatrick* vs. *U. S.*, 178 U. S., 304, 315), be cross examined as to every statement that he has made in his own behalf.

Fitzpatrick vs. *U. S., supra;*
Sawyer vs. *U. S.*, 202 U. S., 150, 165;
Powers vs. *U. S.*, 223 U. S., 303, 314, 315;
Spies vs. *Illinois*, 123 U. S., 131, 181;
U. S. vs. *Mullaney*, 32 Fed., 370 (Brewer, J.).

The Supreme Court of Maine in *State* vs. *Wentworth* (65 Me., 234, cited in *Brown* vs. *Walker*, 161 U. S., page 598, and *McAlister* vs. *Henkel*, 201 U. S., page 91), expressly analogizing the criminal defendant who takes the stand in his own behalf to the "ordinary witness," thus laid down the rule:

> *"If a witness state a fact he is bound to state all he knows about it, though in so doing he may expose himself to a criminal charge.* In *State* vs. *K.*, 4 N. H., 562, the witness said he knew the defendant was innocent of the offense charged, but he could not state how he knew that without implicating himself. The court said, 'If he chooses to testify to that fact, we shall permit the attorney general to inquire how the witness knows that fact, and compel him to answer the question.' If he discloses part, he must disclose the whole in relation to the subject matter about which he has answered in part. *Coburn* vs. *Odell*, 30 N. H., 540; *Foster* vs. *Pierce*, 11 Cush., 437. *Answering truly in part with answers exonerative, he cannot stop midway, but must proceed, though his further answers may be self-criminative.*

Answering falsely as to the subject matter, he is not to be exempt from cross examination because his answers to such cross examination would tend to show the falsity of those given on direct examination. If it were so, a preference would be accorded to falsehood rather than to truth" (page 24; italics ours).

(5) According to the great weight of American authority, the principle of waiver applies as well to partial disclosures as to denials.

The testimony upon which the claim of waiver is predicated is, as we have already noted, testimony both by way of denial and by way of partial disclosure. The proposition that a witness who denies guilt may then be cross examined (or if a hostile witness in effect cross examined) upon his denial, is undisputed everywhere. This result may indeed be put either upon the reasoning that where criminality is denied there can be no incrimination (compare *Mason* vs. *U. S.*, 24 U. S., at page 367) or upon the principle of waiver (compare *State* vs. *Foster*, 23 N. H., 348, supra; see also *State* vs. *Wentworth*, 65 Me., 234, supra).

With respect to partial disclosures there is some divergence between the English and the American rules. The English courts have finally held that a witness who discloses facts which tend to establish his guilt, may still refuse to answer further questions (*Regina* vs. *Garbett*, 2 C. & K., 474, 495, 1 Den. Cr. C. 236). The great majority of American courts have adopted a principle which Mr. Wigmore thus formulates. An "ordinary witness" waives his privilege (4 *Wigmore*, Section 2276, page 3151)

> "by exercising his option of answering; this is conceded. Thus the only inquiry can be whether, by answering as to fact X, he has waived it for fact Y. If the two are related facts, parts of a whole fact forming a single relevant topic, then his waiver as to a part is a waiver as to the remaining parts * * *."

This Court, on the earlier appeal, did not choose and had no occasion to choose, between the English and American rules. Its holding was that the schedules "standing alone" were not "an admission of guilt" under either rule. It accordingly cited indifferently and in conjunction both *Regina* vs. *Garbett, supra,* and *Foster* vs. *People* (18 Mich., 266), a decision which Mr. Wigmore quotes (page 3151), because in it the *American* doctrine is so "aptly expounded." And this Court further cited, in the *Arndstein* case, its own earlier decision in *Brown* vs. *Walker* (161 U. S., 591). In that case, in turn, this Court cited with approval many of the State Court decisions mentioned here. The plain inclination of that opinion is toward the American rule.

Arndstein's testimony, upon which our waiver contention is based, mostly took the form of denials. For practical purposes, therefore, it makes little difference upon the present appeal whether this Court adopts the American or English rule, which differ, as we have seen, only with respect to partial disclosures. We submit, however, as a matter of legal theory, that the American rule is the true rule:

> "A witness has no right under pretense of a claim of privilege. to prejudice a party by a one-sided or garbled narrative" (*Foster* vs. *People, supra*).

So almost all American courts of last resort have concluded (see the cases collected in *Mr. Wigmore's note*, pages 3152, 3153). On the other hand the English courts have been in admitted conflict concerning their own rule (compare *East* vs. *Chapman*, 2 C & P., 570, 572; *Dixon* vs. *Vale*, 1 C. & P., 278, 279 and note the discussion of the authorities in *King of the Two Sicilies* vs. *Willcox*, 1 Sim., N. S., 301, 320).

Least of all, we submit should this Court depart from the American rule in the precise case before it—a case involving the examination of a bankrupt. Upon the precise point that a bankrupt can be examined upon his partial disclosures the English and American courts have reached the same result though upon different theories. So strong is the policy in favor of the free examination of bankrupts that the English Parliament and courts (being of course, unconfined by constitutional restrictions) have withheld from a bankrupt any privilege against self-incrimination (4 Wigmore, section 2260; *In re Atherton*, L. R. [1912], 2 K. B., 251). "It may be noted," says Mr. Wigmore, "that in bankruptcy proceedings the English courts had apparently driven a coach-and-four through the privilege, long before the modern statute of 1883 had expressly nullified it" (pages 3119, 3120).

Precisely in point, as showing the true rule, applicable as well to partial disclosures as to denials, is *In re Bendheim* (180 Fed., 918). A bankrupt in that case had answered questions as to the amount and character of his goods in stock during a certain month and as to real estate owned by him at another time. In these circumstances, it was held that he could not refuse to answer

further questions on the same subject on the ground that his testimony might incriminate him when taken in connection with a financial statement he had made.

The principle of waiver is, as we have seen, a general one. Its application is for several reasons peculiarly cogent in Arndstein's precise case. For he was warned by the Commissioner of his privilege at the very outset, and the statement of his rights that the Commissioner made to Arndstein was even broader than the law of the subject justifies. A few seconds after he took the stand in the first day the Commissioner said to him (page 30): "Any question which is asked you, the answer thereto which in your judgment will tend to incriminate or degrade you, you can decline to answer, stating that you decline to answer upon the ground that it will either tend to incriminate or degrade you." (There is, of course, no constitutional privilege against self-degradation [*Brown* vs. *Walker,* 161 U. S., 591, 598].)

And a waiver of the constitutional privilege will be most readily predicated upon the testimony of a witness who, besides being warned of his rights, has the guidance of counsel—in this instance counsel both expert and zealous. (*U. S.* vs. *Kimball,* 117 Fed., 156, 166—a case cited with approval on the general subject in *Hale* vs. *Henkel,* 201 U. S., 43, 63.)

Arndstein might, then, if he had chosen, have refused to testify about incriminating matters at all. If, however, he did testify about such matters, the trustee's attorney had a right to test his denials and to develop his partial admissions. With the principles of law thus settled, we turn in our next point to the analysis of the disclosures and the denials themselves.

POINT III.

By the testimony which the bankrupt voluntarily gave on his examination concerning his property and assets, his names and his travels, he waived the right to assert his constitutional privilege against further questions upon the same subjects or, indeed upon the "criminating fact as a whole."

The questions which the bankrupt was, by the order of September 1st, directed to answer fall into the following categories: questions concerning his names; questions concerning his whereabouts between February and June, 1920; questions concerning his acquaintance with various persons, his knowledge of the names used by them, and their addresses, and his meetings with them; questions concerning communications between the bankrupt and various persons; and, last and most important, questions directly concerning the bankrupt's possession, receipt and disposition of property.

On September 14th, Arndstein refused to answer each and every question which he had been directed by this order to answer.

His specific refusals to answer questions read to him on that date (pages 150-155) were supplemented (page 155), as we know, by a general refusal to answer "every question that is asked" on the ground that it would incriminate and degrade him (page 155).

Yet he had testified concerning his property, his names and his travels without asserting his privilege against self-incrimination.

(1) Arndstein's denials of the ownership and possession of stocks and bonds compared with subsequent refusals to testify.

Concerning the ownership and possession of stocks and bonds he had sworn:

"Q. Have you any stocks or bonds now?

A. I never had any in my life. I never owned a share of stock in my life. I never even saw a genuine certificate in my life. I never possessed one in my life, any negotiable stock" (page 37).

* * * * * * * *

"Q. Did you ever have any stocks or bonds in your possession or under your control, at any time during the past year?

A. I never owned a share of stock; I never had a share of stock that was good, to my knowledge, in my life.

Q. What do you mean by 'good'?

A. Well, anything that was negotiable.

Q. What?

A. Nothing negotiable.

Q. Did you ever have any that were not negotiable?

A. Yes; I bought some years ago.

Q. We are talking about the past twelve months.

A. No, sir.

Q. Have you had any stocks or bonds in your possession or under your control at any time during the past year?

A. I just answered that.

Q. No, I did not get the answer. (Question read.)

A. I answered that, I said no (pages 46-7).

* * * * * * * *

Q. Have you had, Mr. Arndstein, any stocks or bonds during the past year, in your name or in your possession or under your control?

A. No, sir" (page 135).

Yet he *refused* to answer the following questions on this subject on the ground that they might incriminate and degrade him (see page 150):

"Did you buy or sell any shares of stock or bonds at any time during the past year"? (page 152),

"Did you ever see any stocks or bonds during the past year, anywhere"? (page 152).

"Did you touch any stocks or bonds at any time, or place, within the past year"? (page 152).

and he *refused* to testify concerning his possession of specific shares of stock and bonds, a list of which was exhibited to him:

"Q. Do you say that you never had in your possession or under your control, a single share of stock, or bond mentioned in this list, Exhibit 1 for Identification, of this date?

A. Is that what you showed me before, this one here?

Q. Yes.

A. I cannot answer, on the ground it may incriminate me.

Q. Well, do you say that you never saw those securities?

A. I cannot answer, for the same reason.

Q. You say you never touched them?

A. I cannot answer for the same reason" (page 47).

To this *refusal* he adhered on September 14th without stating any other reason than his previous refusal:

"Q. Do you say that you never had in your possession or under your control, a single share of stock, or bond mentioned in the list marked Exhibit 1, which has been shown to you in this proceeding?

A. (No answer.)

Q. Do you refuse to answer that?

A. I answered that long ago; and I refuse again.

Q. Do you say that you never saw those securities?

A. I refuse to answer.

Q. Do you say you never touched them?

A. (No answer)" (pages 152-3).

(2) Arndstein's denial that he had seen certain stocks and bonds in the possession of any one compared with his subsequent refusal to testify.

On May 15th, he gave the following testimony which in a somewhat different regard, dealt with the same specifically listed stocks and bonds:

"Q. The question is: Did you ever see any of those shares of stock or bonds mentioned on this list, which is Exhibit 1 for Identification of this date, in the possession of any other persons, or in anyone else's control?

A. No, sir.

Q. At any time or place?

A. No" (page 48).

On September 14th he *refused* to answer the same question, this time without even troubling to reiterate "for the same reason";

> "Q. Did you ever see them in anyone else's possession?
>
> A. (No answer.)
>
> Q. Do you refuse to answer?
>
> A. Yes, I refuse" (page 153).

(3) Arndstein's denials and partial disclosures concerning his bank accounts and safe deposit boxes, compared with his subsequent refusal to testify.

On May 15th he testified as follows concerning his bank accounts and safe deposit boxes:

> "Q. Well, have you? (Meaning have you any bank accounts or safe deposit boxes.)
>
> A. I have two.
>
> Q. Where?
>
> A. One in the Pacific Bank.
>
> Q. A bank account?
>
> A. I have one there, yes; and also a box there. The other box I have jointly, together with my wife, I don't know, the Mortgage Trust Company I think it is.
>
> Q. U. S. Mortgage & Trust Company?
>
> A. Yes.
>
> Q. You say you have not any other bank account or safe deposit boxes?
>
> A. No, sir.
>
> Q. And you have not had any in the past two or three years?
>
> A. Oh, yes. I did have one in the Harriman Bank. But I was only in that bank a short while (pages 35-6).

* * * * * * * *

Q. Did you ever have, in the past two or three years, any other bank accounts or safe deposit boxes?

A. No, sir.

Q. Either in your own name or anyone else's name?

A. No; none.

Q. How?

A. No; none whatever (page 36).

* * * * * * * *

Q. You say you have not now, and never did have in the past three years, any other bank accounts or safe deposit boxes?

A. That is right.

Q. Directly or indirectly?

A. No.

Q. In your own name, or in the name of anyone else?

A. No; that is right.

Q. Or under your own control, or under the control of someone else; is that right?

A. That is right" (pages 36-7).

* * * * * * * *

"Q. Have you any bank account in any other name?

A. No.

Q. Or any safe deposit box in any other name?

A. No.

Q. Did you ever open any bank account in any other name?

A. No.

Q. Or any safe deposit boxes in any other names?

A. No, sir" (pages 39-40).

On September 14th, he *refused* to answer the following question:

> "Q. What banks, trust companies, safe deposit companies, or brokers, have you visited since the 10th of February, this year?
> A. I refuse to answer" (page 154).

And his general *refusal* to answer "every question that is asked" (page 155) on the ground that it would incriminate and degrade him included the questions:

> "64. Have you had access to any safe deposit boxes during the past year?"
> "65. Have you had any bank accounts anywhere in the United States during the past year?"
> "66. Have you had any safe deposit boxes, either in your name or in anyone else's name anywheres in the United States, during the past year?" (Schedule D, pages 758-9.)
> "241. Have you any safe deposit box there? (Referring to the Pacific Bank.)" (Schedule D, page 765.)
> "5. Have you had any safe deposit box either in your name or in the name of any other person, to which you had access, anywhere in the United States, during the past year"? (Schedule E, page 766.)

(4) Arndstein's partial disclosure of the possession of money compared with his subsequent refusals to testify.

Arndstein, on May 15th, testified concerning money in his possession since February 22nd:

"Q. Have you had any money in your possession since Washington's Birthday, this year?

A. Yes.

Q. How much?

A. About $500.

Q. Where did you get it?

A. Where did I get it? I got it from my wife.

Q. Before you left? . .

A. Yes, sir.

Q. And that is all you had?

A. That is all.

Q. You have only had $500 since Washington's Birthday, this year?

A. Yes" (page 49).

On May 24th he testified further on the same subject:

"Q. Mr. Arndstein you testified that when you left New York in February last you had $500?

A. Yes, sir. . .

Q. What have you done with it?

A. I have used it up for general expenses.

Q. Where?

A. Well, I cannot exactly say where.

Q. How much of it have you spent?

Mr. Fallon: He just said all of it.

A. All of it" (page 120).

Included in his general *refusals* on September 14 to answer "every question that is asked" are, however, these:

"15. How much money have you in your possession or under your control?" (Schedule A, page 752.)

"59. How much money have you had since the filing of the petition of bankruptcy in this proceeding"? (Schedule D, page 758.)

(5) Arndstein's partial disclosures of his aliases compared with his subsequent refusals to testify.

Concerning the various names he had borne Arndstein gave the following testimony on May 15th:

"Q. Have you been known by any other names?

A. Yes sir" (pages 29-30).

* * * * * * * *

"Q. In what name did you have the box in the Harriman Bank?

A. In the name of Arnold.

Q. J. W. Arnold?

A. J. W. Arnold (page 36).

* * * * * * * *

Q. Well, let us stick to the U. S. Mortgage & Trust Company. You had a safe deposit box there?

A. Yes; jointly, together with my wife.

Q. In what name?

A. Her name and mine.

Q. In what name did you have that; Arnold?

A. Arnold.

Q. J. W. Arnold and wife; is that right?

A. Yes, sir.

Q. In the Pacific Bank you had your bank account in the name of J. W. Arnold?

A. In the name of J. W. Arnold.
Q. And the box, J. W. Arnold?
A. Yes, J. W. Arnold" (page 36).

On the same day, however, he *refused* to answer the question by what other names besides the name of Arndstein he had been known (page 30). And on September 14th his general *refusal* to answer "every question that is asked" included the following questions:

"1. What other names? (Referring to the fact that the bankrupt had been known under various names.)

"2. By what other names have you been known besides Jules Arndstein"? (Schedule D, page 756.)

"167. Did you ever go under any other name"? (Schedule D, page 762.)

"202. Have you been known as George"? (Schedule D, page 763.)

(6) Arndstein's partial disclosure that he had been at the Hotel Winton in Cleveland compared with his refusal to testify whether he had a room there.

On May 18th Arndstein identified one of the places where he had been during his mysterious absence.

"Q. Were you at the Hotel Wilton at any time during the past three months?
A. At the Winton?
Q. At the Winton, Cleveland.
A. Yes.
Q. More than once?
A. No; only once" (page 113).

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POINT IV.

The Court, not the witness, is the judge whether a possibility of incrimination exists. It is plain that some of the questions Arndstein refused to answer could not have incriminated him. This is apparent in some instances from the character of the questions themselves; in some instances from the answers given to other questions.

(1) Arndstein's assertion that his answers would incriminate him is not conclusive. It was correctly overruled wherever it appeared either from the nature of the question or from his previous testimony that his answers would not, in truth, have that effect.

The witness is not in the first instance the sole judge whether his answer will incriminate him. He must first show to the Court that a responsive answer *may*, in the surrounding circumstances, have that effect. Then, and not till then, does the decision whether his answer will in fact tend to incriminate him rest with the witness himself. The relation between the general obligation to testify and the special privilege against testifying to incriminating matters was stated by Chief Justice Marshall (*In re Willie*, 25 Fed. Cases, 14, 692e, pages 38, 39) in language which this Court in *Mason* vs. *U. S.* (244 U. S., 362, 364), made its own:

> "When two principles come in conflict with each other, the Court must give them both a

> reasonable construction, so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded. They are believed both to be preserved to a reasonable extent, and according to the true intention of the rule and of the exception to that rule, by observing that course which it is conceived courts have generally observed. It is this: When a question is propounded, it belongs to the Court to consider and to decide whether any direct answer to it can implicate the witness.'"

This Court in the same case laid down the principle "that witnesses certainly" are

> "not relieved from answering merely because they declared that so to do might incriminate them" (244 U. S., at pages 366-7).

See the statements in

> *Ex parte Irvine*, 74 Fed., 954, 961 (Opinion by Taft, C. J.);
> *In re Naletsky*, 280 Fed., 437, 443.

Where there is nothing before the Court to show a possibility of self-incrimination, the witness must be held to answer the question.

> *Elwell* vs. *U. S.*, 275 Fed., 775, certiorari denied 257 U. S., 647;
> *Rosendale* vs. *McNulty*, 23 R. I., 465.
> *Bradley* vs. *Clark*, 133 Cal., 196.

In the *Elwell* case the Court said:

> "The plaintiff claimed before the grand jury, and he is here claiming, not only the right to refuse to make answers that might tend to incriminate him, but also the right in himself, and not in the court, to determine what might or might not tend to incriminate him. This precise question was before the Supreme Court of the United States in *Mason* vs. *U. S.*, 244 U. S., at page 365, and determined adversely to plaintiff's contention. * * * The plaintiff expressly refused to give any information which would enable the court to determine whether his answer to the question as to who wrote the article would tend to place the witness in peril. Under such circumstances, it was the duty of the District Court to insist upon the question being answered."

A fortiori, when the Court sees that *there can be no danger* to the witness in answering he must be held to answer.

The trial court may indeed put questions designed to bring out facts which will test the claim of privilege provided that inquiry "does not" itself "invade" the witness's "immunity" (*McGorray* vs. *Sutter,* 80 Ohio St., 400). It may, therefore, of course, consider the witness's answers to other questions (*Mason* vs. *U. S.,* 244 U. S., at page 367).

The witness is then not the sole judge whether or not his answer will incriminate him. The Court is to determine whether or not danger of incrimination exists. The test of danger again, is well defined. In the *Mason case* (244 U. S., at pages 365-

366), this Court said, quoting from *The Queen* vs. *Boyes* (1 B. & S., 311, 329-330):

> "'Further than this, we are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of the law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party, called upon to give evidence in a proceeding *inter alios*, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice.'"

So, too, in *Heike* vs. *U. S.* (227 U. S., 131), it was tersely remarked that

> "the constitutional protection is confined to real danger."

To the same effect is *Ex parte Irvine, supra.*

From the principle—a principle true as matter of definition—that there is no privilege as to answers manifestly not incriminating, there follows

a practical corollary. If the trial judge, who knows the whole case and its atmosphere, rules that a given answer is not incriminating, his discretion will not be lightly disturbed by an appellate court (*Mason* vs. *U. S.*, supra, 244 U. S., at page 367; for a collection of authorities and a good statement see *Ex parte Copeland*, 91 Tex. Cr., 549).

Least of all will it be lightly disturbed by an appellate court where the attack upon the ruling is made not by appeal from that ruling or from the contempt order, but collaterally by writ of *habeas corpus*. In the instant case the Commissioner occupied the position of a trial court. In some instances, his ruling was specifically re-enforced by rulings of the District Judge (see Mr. Fallon's admissions at page 118; compare pages 71-72).

The principles to which we have alluded are at once general and elementary. They apply in whatever kind of proceeding a witness claims his privilege. Most cogently do they apply in a bankruptcy case, where the witness is under a statutory direction to testify (Sec. 7, subdivision 9; Sec. 21a) and where the whole statutory apparatus for investigation would be reduced to a nullity unless the bankrupt's claims of privilege were subjected to some test of reasonableness (*In re Naletsky*, 280 Fed., 437, 443).

(2) Inquiries whether Arndstein knew certain persons or knew where they lived could not tend to incriminate him upon any charge, nor could the inquiry whether he had been in gambling houses subject him to any Federal prosecution.

(a) The Commissioner ruled that Arndstein must answer, among other questions, the inquiries (Schedules A-12 and A-13):

"Do you know Randolph Newman, the lawyer?

"Do you know Nick Cohen" (page 752)?

As these questions were put on the first day (pages 64, 67), it seems upon Mr. Fallon's general admission (page 118), that the District Judge specifically approved this ruling, though he rendered no written opinion. *This Court cannot say upon appeal and in a collateral proceeding that Arndstein could incriminate himself by admitting acquaintance with a member of the bar or even with a layman.*

(b) The same principle applies to many other questions requiring the witness simply to state whether he knew certain named individuals (see numerous questions, pages 752, 753-755, 757, 764-765, 767-768). Each of these questions called for an answer "yes" or "no," and had his answer in each instance been "yes," that answer would have gone no further than admitting the mere fact of acquaintance.

It has been specifically held (*Overend* vs. *Superior Court*, 131 Cal., 280) that no possible answer to the question,

"Do you know the defendant?"

—*the defendant in a criminal case*—could incriminate the witness.

Compare the late case of *Ex parte Holliway* (272 Mo., 108), in which was held that no answer to the question who gave the witness the information he had published concerning the supposedly secret proceedings of the grand jury, could incriminate him.

(c) The same principle applies again to the question (included in the bankrupt's general refusal to answer—page 155):

> "Q. Do you know under what different names Nick Cohen has been known?" (Question 47, Schedule E, page 768.)

(d) Other questions inquiring whether the bankrupt knew where certain persons lived or knew what their addresses were (pages 759-61, Schedule D, Questions 77, 96, 102, 120, 150) are included in the general refusal to answer (page 155). These questions too literally call for nothing further than "yes" or "no" and certainly not for an incriminating answer.

The Supreme Court of Arkansas declared harmless and required the witness to answer the inquiry (*Ex parte Butt*, 78 Ark.. 262):

> "Q. Do you know where Room 215 in the Fulk Building in the City of Little Rock is?"

(e) Included in the bankrupt's general refusal are the following questions:

> "60. Were you at any gambling houses in Cleveland during the past three months?
>
> 61. Were you in any gambling houses anywhere in the United States during the past six months?" (Schedule E, page 769.)

No charge of gambling was pending against the bankrupt, nor, so far as we know, could he be held liable before any Federal Court on any such charge. Certainly neither the answer "yes" nor "no" could have tended to incriminate him on the charge of

concealing assets, the only criminal liability involved in the case. (The possibility of prosecution in some State Court gives no privilege against answering in a federal tribunal [*Hale* vs. *Henkel*, 201 U. S., 43, 68-69; *Jack* vs. *Kansas*, 199 U. S., 372.])

In *Mason* vs. *U. S.* (244 U. S., 362), this Court considered a claim of privilege with respect to the questions:

> "Was there a game of cards being played on this particular evening at the table at which you were sitting?
>
> "Was there a game of cards being played at another table at this time?"

These questions had been asked of the witness Mason at a grand jury investigation of a charge of gambling against others. Mason had already testified to his presence in the billiard parlors where the defendants were arrested. The trial Court's ruling that the answers to these questions would not tend to incriminate the witness was sustained by this Court.

In re Richards (Fed. Cas. 11769, opinion by Blatchford, J.) is in accord with respect to questions about gambling put to a bankrupt upon his examination.*

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*While the non-incriminating quality of the foregoing questions is settled by American decisions the result is even more palpably correct upon the English theory of waiver (*supra* page 26). Upon the theory that a witness who has once testified can stop his story at any point that seems to him a point of danger, the utter safety of any possible replies to the inquiries here considered is too clear for argument. The adoption of a rule more liberal to the witness upon the issue of waiver than the prevailing American rule, compels the application of a more stringent test of what can be an incriminating answer.

(3) Arndstein's assertions that he could not answer certain questions about his property without incriminating himself are shown by his previous testimony to have been false.

We have considered some questions whose intrinsic quality shows that they could have been safely answered. It remains to consider a group of questions whose innocuous character is shown by other answers of Arndstein himself.

(a) The bankruptcy petition was filed on February 20, 1920 (page 8). He testified that since Washington's Birthday he had had only $500 in all (page 49). In the circumstances the Commissioner properly concluded that the witness could safely answer the question,

> "Aside from the $500 you spoke of, have you had any money or property in your possession, or held by you, since the filing of the bankrupt petition" (Schedule A-7, page 751).

The only possible answer to the question Arndstein could give, assuming that his other testimony was correct, would be "No."

(b) The same principle applies to a question concerned with the possession of property before bankruptcy. After careful deliberation over the question of time Arndstein (pages 89-91) assented to the statement that "for a period of at least seven months immediately preceding the filing of the petition of bankruptcy in this proceeding," he "did not have any property of any nature, kind or description" (pages 91-2). The petition in bankruptcy was filed, as we have just said, on February 20th

(page 8) and seven months theretofore would go back to August 20, 1919. It follows that the question

> "Were you in October, 1919, in the possession of any property" (Question 5, Schedule A, page 751)—

included in the general refusal to answer (page 155), would have to be answered "no."

(c) On September 14th, he was asked:

> "Did you buy or sell any shares of stock or bonds at any time during the past year" (page 152)?

He refused, giving "the same reason" (page 152)—that his answer would "degrade and incriminate him" (page 150). Yet he had twice before (pages 46-7, 135) denied that he had had any shares of stock or bonds *in his possession or under his control* during the same period of time, and these denials indicate plainly enough that his answer to the more specific question must also have been "no."

In these instances it is evident from Arndstein's own testimony that his answers would not have incriminated him, and the Court is not obliged to shut its eyes to this testimony. The decision of this Court in *Mason* vs. *U. S.* (*supra*) is cogent authority on this phase of the subject, too. In that case, Mr. Justice McReynolds remarked that the "wisdom" of overruling a claim of privilege concerning the questions submitted was "well illus-

trated" by even an *enforced* answer later given to the same question (244 U. S., page 367). The holding must be the same where the answers given to more comprehensive questions show that the only possible answer to the questions under consideration must have been a harmless answer.

(d) The same consideration applies to instances in which Arndstein refused to answer questions he had once answered and which were repeated (see (a), (b), (d), (f) and (g), pages 61-6, *infra*).

It might perhaps have been contended before the Commissioner, or even before the District Court, that Arndstein was under no obligation to go on answering essentially the same inquires more than once. For several reasons, however, no such contention is open to Arndstein in this Court: because the refusals we have here enumerated were put not upon the ground that the questions were redundant, but that the answers might incriminate; because objections to the redundancy of questions are addressed to the discretion of the court of first instance and not to an appellate court; and because this discretion, even had Arndstein tried to invoke it, might well have been exercised against a witness who proved himself to be as evasive and inconsistent as Arndstein.

Precisely supporting these conclusions is Judge Learned Hand's decision in *In re Bendheim* (180 Fed., 918, 920). Overruling a bankrupt's claim of privilege he remarked,

> "The question which he subsequently refused to answer was only a question which he had previously answered put in a different form."

POINT V.

The record shows that Arndstein's claims—and particularly his final claims—of privilege were not made in good faith. This appears plainly by comparison of his apparent willingness to testify on the first day of the hearing with his obstinate refusal to give any testimony whatever on the last day; by his gradual yielding to counsel's instructions to claim privilege against many questions which at first he was willing to answer; and by answers and admissions contained in his testimony which plainly contradict his final claim of privilege to the same or similar questions.

Since the constitutional provision is not intended to afford a mere convenient pretext for refusing to testify, the privilege is not extended to one who invokes it in bad faith as a mere subterfuge to avoid answering. This is shown alike by cases in which the claim of privilege is denied and by cases in which it is upheld.

McGorray vs. *Sutter,* 80 Ohio St., 400;
Ford vs. *State,* 29 Ind., 541;
In re Cappeau, 198 App. Div., 357;
Lockett vs. *State,* 145 Ark., 415;
People vs. *O'Brien,* 176 N. Y., 253;
Janvrin vs. *Scammon,* 29 N. H., 280;

Chamberlain vs. *Willson*, 12 Vt., 491;
Edmonston vs. *Commonwealth*, 110 Va., 897;
See also *Mason* vs. *U. S.*, 244 U. S., 362, page 367.

It is to insure good faith as well as to guard against a mistaken fear of self-incrimination (*McGorray* vs. *Sutter*, 80 Ohio St., 400) that the witness is not permitted to be "the sole judge as to whether his evidence would bring him into danger of the law" (*Queen* vs. *Boyes*, 1 B. & S., 311; quoted in *Mason* vs. *U. S.*, 244 U. S., 362, 365; see also *Commonwealth* vs. *Bolger*, 229 Pa., 597); he is required to show the court "that there is reasonable ground to apprehend such danger" before the court can surrender to the witness the duty of "judging for himself of the effect of any particular question" (*Queen* vs. *Boyes*, *supra;* see also *Elwell* vs. *U. S.*, 275 Fed., 775, certiorari denied, 257 U. S., 647). It is to insure good faith, again, that the witness who refuses to answer on the ground that his answer will incriminate him, is properly required to state upon oath that his answer will actually have that effect (*Southard* vs. *Rexford*, 6 Cow., 254), and is liable for perjury if that statement is falsely made (*In re Naletsky*, 280., Fed., 437). On the same principle it has often been held that the privilege must be claimed by the witness himself and cannot be claimed by counsel (*Hale* vs. *Henkel*, 201 U. S., 43, page 70) and even that counsel may properly be denied the right to argue in support of the privilege (*Rapalje's Law of Witnesses*, Sec. 265, page 437, citing *Thomas* vs. *Newton*, M. & M. 48 n; *Doe d. Rowcliffe* vs. *Egremont*, 2 Mo. & R. 386).

Appellant's contention, based on the record as a whole, is that in many instances Arndstein's refusals to answer the questions put to him on September 14th, 1920 (Record, pages 150-155)—the questions which the Court had directed him to answer (Order of September 1; pages 774-5)—was not due to his own conscientious belief that he could not safely answer, but to counsel's instructions that he could with impunity refuse to answer, and that the answers which he had given earlier in the examination show that his claim of privilege on September 14th was not made in good faith. The impression of a complete absence of good faith is most strongly conveyed by the 125 pages of Arndstein's testimony as a whole, especially when those pages are read continuously. The extracts we give below, however, should serve to show his confessed inconsistencies and self-contradictions.

(1) Arndstein's apparent willingness to testify at the opening of the hearing on May 15th, compared with his obstinate refusal to answer every question put to him on September 14th.

Instructive on the question of good faith is the progression which the record shows from apparent willingness at the opening of the hearing to answer all questions, except such as the bankrupt really feared would incriminate him, to confirmed refusal to answer any questions at all on September 14th. Compare for instance with the mechanical reiteration, "I refuse to answer, for the same reason," on the latter date (pages 150-154), the following questions and answers on May 15th:

"Q. Have you been known by any other names?

A. Yes, sir" (pages 29-30).

* * * * * * * *

"Q. Did you go to any bank or trust company this morning?

A. No, sir" (page 33).

* * * * * * * *

"Have you any stocks or bonds now?

A. I never had any in my life. I never owned a share of stock in my life. I never even saw a genuine certificate in my life. I never possessed one in my life, any negotiable stock" (page 37).

* * * * * * * *

"Q. Did you ever have any stocks or bonds in your possession or under your control, at any time during the past year?

A. I never owned a share of stock; I never had a share of stock that was good, to my knowledge, in my life.

Q. What do you mean by 'good'?

A. Well, anything that was negotiable.

Q. What?

A. Nothing negotiable.

Q. Did you have any that were not negotiable?

A. Yes, I bought some years ago.

Q. We are talking about the past twelve months.

A. No, sir.

Q. Have you had any stocks or bonds in your possession or under your control at any time during the past year?

A. I just answered that.

Q. No; I did not get the answer. (Question read.)

A. I answered that; I said no" (pages 46-7).

Note also the freedom with which he testified on May 15th concerning his bank accounts and safe deposit boxes (pages 35-6), and gave answers exculpating his relatives (pages 33-5, 37-40), his wife (pages 40-42) and his wife's relatives (pages 40-42) from any charge of aiding in the secretion of assets.

(2) Gradual substitution of counsel's instructions for the witness's own conscience.

We have noted the bald fact that Arndstein, although notified of his privilege at the beginning, was at that time willing, and was stubborn at the last. The explanation lies in the interference of his counsel. The interference began with *sotto voce* promptings how particular questions should be answered. These are marked in the record by the protests of the trustee's lawyer (see pages 31, 32, 37).* Mr. Fallon was then directed to sit further away from the bankrupt (page 37), but more

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*The coaching of Arndstein by his counsel was early noted by the participants in the hearing. At page 31 the trustee's attorney asked "Is this counsel going to be allowed to tell this man what to answer?" And the Commissioner said "No." Trustee's counsel made the same point shortly thereafter on page 32 and asked to have the witness directed to sit further from his counsel. At page 37 appears the following colloquy:

"Mr. Myers: Your Honor, I wish to call attention to the fact, and I ask that this counsel be separated from this witness, or I will not go on with the examination in this room.

than once afterwards he succeeded in having a private word with him between the time that a question was asked and an answer required (see pages 50, 87, 107, 132). For the most part, his interference took the form of objections and argument addressed to the Commissioner. If these tactics did not always succeed with the Commissioner, they did with the witness, who almost invariably took the cue and stood on his privilege.

(a) Mr. Fallon stopped Arndstein from answering the question "where" he had been traveling, by protesting to the Commissioner:

> "Now I ask your Honor to instruct the witness that he may claim his privilege to that question" (page 50).

This led to a long dispute concerning the propriety of the question, after which the witness finally took the ground that the answer would "degrade" him and declined to give it (page 51).

The Commissioner: Mr. Fallon, you had better shift your chair, and get away, and not address the witness at all. Do not do that.

Mr. Myers: I will not go on until he gets away from this witness.

The Commissioner: Mr. Arndstein, just change places with this man.

The Witness: I might say that Mr. Fallon is not coaching me; I am not listening to it, sir.

The Commissioner: I saw him.

Mr. Fallon: I have advised the witness to refuse to answer all these questions.

(The Commissioner directs Mr. Fallon to sit further away from the witness.)

Mr. Fallon: I promise your Honor that we won't come in personal contact again."

(b) Having been instructed by the Commissioner (page 84) to answer the question:

> "Have you any money in your possession or under your control" (page 83),

and having thereupon answered

> "Yes, I have" (page 84),

he was asked

> "How much"?

His counsel intervened immediately with the objection

> "Now, if your Honor please, *we* object to how much * * *" (page 84),

followed by a lengthy argument. The witness was eventually directed to answer, but refused, and persisted in the refusal on the ground that it would incriminate him (page 84).

(c) Arndstein was asked the question (page 131):

> "Aside from the $500 you spoke of, have you had any money or property in your possession or held by you, since the filing of the bankruptcy petition"?

and replied,

> "I answered that at the last hearing, sir."

Mr. Fallon thereupon called for a ruling as to whether the question was privileged and himself volunteered:

> "*He* refuses to answer."

After this statement of counsel, the witness being asked,

"On what ground"?

answered,

"The same ground, sir; tend to incriminate me."

(d) Lengthy arguments of counsel in support of the witness's refusals to answer appear at pages 67, 69, 78, 110, 111, etc.

Besides these plain indications that Arndstein was influenced and encouraged by his counsel to claim his privilege in many instances where he himself had no wish to do so, there are many flagrant cases in which his counsel assumed the right to dictate to him what his answers must be:

(e) At page 75, the witness answered, or at least indicated his willingness to answer the question:

"Q. Do you know Nick Cohen?
Mr. Myers: Will you answer that?
A. Yes, sir";

whereupon Mr. Fallon immediately ordered the witness to change his answer, saying,

"No; you refuse to answer."

(f) "Q. Have you any property of any nature, kind or description since the filing of the petition in bankruptcy in this proceeding?

* * * * * * * *

The Witness: Yes; I have had a little money from time to time.

Mr. Fallon: No. I ask that your Honor tell him he can answer that just yes or no; not about a little money" (page 92).

(h) To the same effect are the peremptory instructions, "Now, don't answer that," at page 94, and again, "Don't answer that," at page 130.

(i) Counsel's assumption that the decision whether to answer rested with him rather than with the witness appears also in such statements as these:

"Well then, *I do not mind* if he answers that. * * * Now answer that" (page 87).

"*I do not mind* his answering it" (page 112).

and again

"*We* also refuse to answer that" (page 140).

(j) The influence of counsel is seen again in the answers "I do not know" (pages 87-8, 89, 113), given after counsel's objection, ostensibly directed to the Commissioner, had suggested such answers.

(3) Inconsistency between refusals to answer and answers given.

We have in general terms remarked Arndstein's progression from readiness to obstinacy and have stated its explanation. It remains to note more specific contrasts. Arndstein's own earlier answers will show that some of his refusals to answer on September 14th could not have been made in good faith.

(a) At pages 35-6 he testified, upon being asked whether he had any safe deposit boxes:

"A. I have two.

Q. Where?

A. One in the Pacific Bank.

Q. A bank account?

A. I had one there, yes. And also a box there. The other box I have jointly, together with my wife, I don't know, the Mortgage Trust Company I think it is.

Q. U. S. Mortgage & Trust Co.?

A. Yes.

Q. You say you have not any other bank account or safe deposit boxes?

A. No, sir."

Yet at page 95 we find him refusing to answer questions about his bank account and safe deposit boxes:

"Q. Have you had any bank accounts anywhere in the United States during the past year?

A. I cannot answer that, for the same reason."

* * * * * * * *

"Q. Have you had any safe deposit boxes, either in your name or in anyone else's name, anywheres in the United States, during the past year?

A. I cannot answer that, for the same reason."

And at page 108, he again refused to testify on the same subject:

"Q. Do you know anyone who has an account in the Pacific Bank?

A. I cannot answer that for the same reason,"—

although later, on May 24th, he *admitted remembering the earlier testimony* that he himself had an account in the Pacific Bank. See the following questions and answers at page 136:

"Q. You testified on your former examination that you had an account in the Pacific Bank, did you not, page 13 (2076) of the record?

A. (No answer.)

The Commissioner: Mr. Arndstein, you know whether you did or not.

The Witness: Yes, sir."

(For a repetition of the claim of privilege on Sept. 14th, see page 765, Schedule D, Questions 240, 241, and page 155.)

(b) At page 85, he was asked concerning money which he testified (pages 83-4) he had in his possession:

"When did you get it?"

He answered:

"I cannot say, for the same reason."

He was then asked:

"Did you get it this year?"

and answered as before,

"I cannot say, for the same reason."

At page 139 the examiner, referring to the earlier questions and answers on this subject, again asked,

> "When, Mr. Arndstein, did you get that money?"

His answer was:

> "I do not know, sir."

The examiner again taxed him with the inconsistency between this answer and his former claim of privilege:

> "Q. That is the same question, in substance, that you refused to answer on the ground that it might incriminate you?"

And Arndstein admitted it:

> "Yes, sir" (page 139).

(For repetition of the claim of privilege on Sept. 14th, see page 155 and page 758, Schedule D, Question 46.)

(c) At page 75, he was asked and answered:

> "Q. (Question read as follows): Do you know Nick Cohen?
> Mr. Myers: Will you answer that?
> A. Yes, sir,"

while at page 151 (September 14th) to the same question:

> "Q. Do you know Nick Cohen?"

his response was,

> "I refuse to answer."

(d) We have already noted (pages 31-2, *supra*) the testimony (pages 46 and 47) denying the possession of stocks and bonds:

At page 95 we find the witness setting up the claim of privilege to the same questions he had answered before:

> "Q. Have you had any stocks or bonds during the past year, either in your name or possession or under your control?
>
> A. I cannot answer that for the same reason."

At page 135, however, the witness returned to his first answer:

> "Q. Have you had, Mr. Arndstein, any stocks or bonds during the past year, in your name or in your possession or under your control?
>
> A. No, sir."

(For a repetition of the claim of privilege on Sept. 14th, see page 155 and page 767, Schedule E, Question 20.)

(e) The answer already quoted:

> "I never had any in my life. I never owned a share of stock in my life. I never even saw a genuine certificate in my life. I never possessed one in my life, any negotiable stock" (page 37),

is inconsistent with another subsequent claim of privilege:

"Q. I show you a list of securities and ask you whether you ever had any of these securities in your possession or under your control?

A. I cannot answer, for the same reason" (page 46).

(For repetition of the claim of privilege on Sept. 14th, see pages 152-3.)

(f) At page 49 the bankrupt was asked:

"Q. Have you had any property in your possession anywhere since Washington's Birthday this year?"

After a preliminary refusal to answer, and instruction by the Commissioner to answer "Just yes or no," the question was re-read and the witness answered

"No, sir,"

but at page 153 (September 14th) we find the claim of privilege re-asserted:

"Q. Have you had any property in your possession anywhere since Washington's Birthday this year?

A. I refuse to answer, for the same reason."

(g) A comparison of the witness's testimony on pages 47, 48 and 153 shows a similar change from a claim of privilege to an answer "No" and a later return to the refusal to answer:

"Q. Did you ever see them in anyone else's possession?" (Referring to a list of stocks and bonds exhibited to the witness.)

"A. I *cannot* answer that.

Q. Will that degrade you?

A. Yes, sir; both ways; and incriminate" (page 47).

* * * * * * *

"The Commissioner: That (referring to the same inquiry) will not tend to incriminate him.

The Witness: I *can* answer that.

Mr. Myers: The witness just said he is willing to answer.

The Commissioner: Answer the question.

The Witness: No.

Q. (Question read as follows.) Did you ever see them in any one else's possession? You understand the question? The question is: Did you ever see any of those shares of stock or bonds mentioned on this list which is Exhibit 1 for identification of this date, in the possession of any other person, or in any one else's control?

A. No, sir."

Q. At any time or place?

A. No (page 48).

* * * * * * *

"Q. Did you ever see them in anyone else's possession?

A. (No answer.)

Q. Do you refuse to answer?

A. Yes, I refuse" (page 153).

(h) He answered the question.

"Q. Have you had any stock or bonds in your possession or under your control at any time during the past year?"—

with emphatic denial:

"A. I answered that; I said no" (page 47),—

a denial repeated at page 135. Contrast with these denials the witness's claim of privilege to the following questions:

"Q. Did you buy or sell any shares of stocks or bonds at any time during the past year?

A. I cannot answer, for the same reason" (page 47).

* * * * * * *

"Q. Have you at any time since the 1st of October, 1919, sold or transferred any stocks or bonds?

A. I refuse to answer, sir, for the same reason" (page 143).

(For repetition of the claim of privilege on September 14th, see page 152.)

Arndstein's statements that his answers would incriminate him were parts of his sworn testimony and subject to the rules governing perjury and contempt through obstructive perjury (*In re Naletsky,* 280 Fed., 437; *In re Nachman,* 114 Fed., 995; *State* vs. *Faulkner,* 175 Mo., 546). In its essence then, Arndstein's case in this regard is very like the case of *In re Bronstein* (182 Fed., 349). Hough, D. J., there sustained an order punishing for contempt a witness (the bankrupt's brother) who first testified that he had loaned money to a person suspected of holding the bankrupt's assets, then retracted this statement and finally repeated his original testimony. "The authorities are uniform

that testifying falsely, intentionally vaguely or contradictorily, constitutes a contempt of Court under Section 41" (182 Fed., page 353).

In *In re Fellerman* (149 Fed., 244) the Court held a showing that one of the bankrupts on two occasions six months apart had given contradictory testimony concerning his acquaintance with the alleged transferee of his property sufficient, without more, to justify his punishment for contempt.

Arndstein, from the legal point of view, made matters not better but worse by finally answering some questions which he first met by an obstinate refusal to answer. "The subsequent offer to testify," as was held of another bankrupt, "is an admission that the defendant could have answered the questions without danger to himself" (*U. S.* vs. *Goldstein*, 132 Fed., 789, page 790; see also *Mason* vs. *U. S.*, 244 U. S., 362, page 367).

(4) "I do not know" used as an alternative to the claim of privilege.

In the three classes of cases we have just analyzed, the refusals of the witness show by their manner and the attendant circumstances the bad faith which vitiates his claim of privilege. The same quality characterizes some answers which he actually gave. The illustrations which follow will show a consistent policy which counsel finally imposed upon the witness. That policy was in its essence as follows: he would claim privilege whenever it might be helpful to his cause, whether or not there was a real danger of incrimination; and when this claim failed he would profess ignorance.

We have mentioned the answer "I do not know" as a typical answer given at the instance of coun-

sel. We shall see that this answer was often a mere subterfuge, a convenient substitute for an unsuccessful claim of privilege. The same bad faith that inspired the refusals to answer colored the answers given in the following instances:

> (a) "Q. How long before the filing of the petition in bankruptcy in this proceeding did you have any property of any nature, kind or description in your possession or under your control?
>
> A. I cannot answer that, for the same reason (referring to the claim of privilege).
>
> The Commissioner: I think that ought to be answered.
>
> Mr. Fallon: Does your Honor direct him to answer that *only if he knows?*
>
> The Commissioner: Well, he presumably is able to take care of himself. I wish you would not prompt him in any way; he is no—he does not need all this help.
>
> A. *I do not know*" (page 89).

(b) Arndstein first testified he did not know from whom his wife had bought an automobile, then refused to answer, "on the ground that it may incriminate me"; heard his counsel remark, "he says he does not know," and finally gave the answer, "I do not know." This extract alone would show that Arndstein and his counsel used a claim or privilege and a profession of ignorance as interchangeable (pages 55-56).

(c) Arndstein first declared himself unable to "answer for the same reason" the inquiry where Nick Cohen lived, then was ordered to answer,

heard the interjection from Mr. Fallon—"if you know," and finally answered that he did not know (page 77).

(d) Important in this regard again is a passage we have already quoted (*supra*, pages 62-3). At page 139 the bankrupt *admitted* that he had just answered "I do not know" to the same question which earlier in the hearing (page 85) he claimed it would incriminate him to answer, the question namely

> "When, Mr. Arndstein, did you get that money?"

(e) For another instance of a profession of ignorance in lieu of a claim of privilege see page 62.

In all these instances "I do not know" was either a plain evasion of the question, or—if true—showed conclusively that the witness could not honestly have believed that his answer would incriminate him when he asserted that it would (compare *Mason* vs. *U. S.*, 244 U. S., 362, page 367). On the first assumption he was punishable for contempt of court (*Lockett* vs. *State*, 145 Ark., 415); on the latter, for both perjury and contempt.* (*In re*

*Perjury constituting an obstruction of justice is a contempt of court (*Ex parte Hudgings*, 249 U. S., 378). The frequent application of this principle to false or evasive answers given by bankrupts and judgment-creditors is illustrated by *In re Schulman*, 167 Fed., 237, affirmed 177 Fed., 191; *In re Kaplan*, 213 Fed., 753, c. d., 234 U. S., 765; *In re Shear*, 188 Fed., 677; *Ex Parte Bick*, 155 Fed., 908; *In re Fellerman*, 149 Fed., 244; *Berkson* vs. *People*, 154 Ill., 81; *In re Rosenberg*, 90 Wis., 581.

Giving the answer "I don't know" was held to be a contempt of court in *In re Gitkin*, 164 Fed., 71; *Berkson* vs. *People*, *supra*; *In re Schulman*, *supra*.

Naletsky, 280 Fed., 437; *State* vs. *Faulker,* 175 Mo., 546; *In re Nachman,* 114 Fed., 995.)

The bad faith which characterizes both Arndstein's answers and his refusals to answer and which over and over again inspired his claim of privilege has a two-fold significance upon this appeal. It is in itself, as we said at the outset, a ground for denying his claim. The constitutional privilege is intended for those who fairly use it for their own reasonable protection. It is not designed as an assistance to witnesses who by subterfuge and evasion obstruct the processes of justice (compare *State* vs. *Lloyd,* 152 Wis., 24, 29). "So strict is the rule that the privilege is a personal one that it has been held in some cases," this court in a leading decision remarked, "that counsel will not be allowed to make the objection" (*Hale* vs. *Henkel,* 201 U. S., 43, 70).*

The claim is even more readily overruled where it is counsel who by his objection (*Knopf* vs. *R. R. Co.,* 2 Penne. [Del.], 392), or interruption (*Taylor* vs. *Wood,* 2 Edw. Ch. [N. Y.], 94) prevents the answer. And the special application of this principle to bankrupt's examinations has been several times judicially noted. (*In re Kross,* 96 Fed., 816; *In re Nachman,* 114 Fed., 995, 997; *In re Naletsky,* 280 Fed., 437; *In re Henschel,* stated in *In re*

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*Cases laying down this principle, even where the witness is a party to the litigation, include *In re Knickerbocker Steamboat Co.,* 136 Fed., 956; *In re Nachman,* 114 Fed., 995; *In re Henschel* (claim of privilege made not by bankrupt but by counsel; case not reported, but stated in *In re Knickerbocker Steamboat Co., supra*); *State* vs. *Wentworth,* 65 Me., 234, 242; *Vineland* vs. *Maretti,* 93 N. J. Eq., 513; *State* vs. *Lloyd,* 152 Wis., 24; *State* vs. *Kent,* 5 N. D., 516; *State* vs. *Ekanger,* 8 N. D., 559, 562; *People* vs. *Larsen,* 10 Utah, 143.

Knickerbocker Steamboat Co., 136 Fed., 956, 959.) The bankrupt, as was said in the *Nachman* case

> "is not to be permitted to interpose his constitutional immunity as a shield to every inquiry concerning his business, nor is his counsel permitted to delay or obstruct inquiry by makng objectons for him."

In none of the cases cited were the facts anything like as strong as in the case at bar; in none of them were the refusals to answer anything like as numerous; in none of them did counsel not only over and over again state and argue the claim of privilege, but order the witness "Don't answer that" or even overrule him with "No; you refuse to answer"; in none of them did counsel instruct the witness how to answer in many instances when the claim of privilege was overruled.

Arndstein's bad faith is then in itself a substantive ground for denying his claim of privilege, especially where the Court's ruling is attacked collaterally. It also—and heavily—re-enforces our earlier contention that some of the questions he refused to answer could not, by any possibility, incriminate him. The fact that Arndstein would apparently claim anything and deny everything if he thought it would aid his cause is the surest indication that some of his claims of privilege were in fact utterly without basis. The Court is never bound to accept the "naked declaration of the witness" that his answer would incriminate (*Bradley* vs. *Clark,* 133 Cal., 196); least of all should it accept such a declaration from such a witness as Arndstein is revealed by this record to be.

Arndstein cannot have his discharge by *habeas corpus* if he left one single proper question unanswered. Some questions that he refused to answer were, in the opinion of the Commissioner who conducted the hearing and upon general principles of law, plainly not incriminating; some were shown not to be incriminating by Arndstein's own sworn answers to other questions. Bad faith inspired alike his claims of privilege and his professions of ignorance. There was waiver of the privilege as to the most important specific issues and as to the criminating fact as a whole. As to many or most of his refusals, Arndstein could not in the circumstances have had relief by direct appeal from the order adjudging him in contempt. Still less can he succeed in attacking that order collaterally by writ of *habeas corpus*.

The order sustaining the writ should be reversed, the writ dismissed, and the prisoner remanded to custody.

Respectfully submitted,

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